SUPREME COURT, U.S.
FILED
MAR 30 2015
OFFICE OF THE CLERK

Nos. 14-556, 14-562, 14-571, 14-574

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES OBERGEFELL, *et al.*,

Petitioners,

v.

RICHARD HODGES, DIRECTOR,
OHIO DEPARTMENT OF HEALTH, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE FAMILY TRUST FOUNDATION OF KENTUCKY, INC., A/K/A THE FAMILY FOUNDATION

STANTON L. CAVE, ESQ.
LAW OFFICE OF STAN CAVE
P.O. BOX 910457
LEXINGTON, KY 40591-0457
TELEPHONE: (859) 309-3000
EMAIL: stan.cave@stancavelaw.com

ADDITIONAL CAPTIONS APPEAR ON FOLLOWING PAGE.

BRITTANI HENRY, *et al.*, *Petitioners*,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, *et al.*, *Respondents*.

VALERIA TANCO, *et al.*, *Petitioners*,

v.

WILLIAM EDWARD "BILL" HASLAM, *et al.*, *Respondents*.

APRIL DEBOER, *et al.*, *Petitioners*,

v.

RICHARD SNYDER, *et al.*, *Respondents*.

GREGORY BOURKE, *et al.*, *Petitioners*,

v.

STEVE BESHEAR, IN HIS CAPACITY AS GOVERNOR OF KENTUCKY, *Respondent*.

TABLE OF CONTENTS

Page(s)

INTEREST OF AMICUS CURIAE.....1

ISSUES BEFORE THE COURT.....2

SUMMARY OF ARGUMENT.....3

ARGUMENT.....8

I. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE STATES TO LICENSE/RECOGNIZE SAME SEX MARRIAGES.....8

II. DEFERENCE TO THE STATES IS NOT DEFERENCE IF IT ONLY APPLIES WHEN IN AGREEMENT WITH STATE ACTION.....11

III. STATES HAVE AN INTEREST IN MARRIAGE LAWS WHICH IS RATIONALLY RELATED TO A LEGITIMATE PURPOSE.....15

A. A "plausible" reason is all that is required.....17

Page(s)

B. Rational-basis review requires deference to State marriage laws.....18

C. Kentucky's marriage laws are rationally related to furthering compelling interests.....26

CONCLUSION.....28

TABLE OF AUTHORITIES
CASES

Page(s)

Adoptive Couple v. Baby Girl,
133 S. Ct. 2552, 2582 (2013).....21

Andersen v. King Cnty.,
138 P.3d 963, 984 (Wash. 2006).....27

Baker v. Nelson,
409 U.S. 810, 810 (1972).....5

Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 366-67 (2001).....27

Bowen v. Gilliard,
483 U.S. 587, 614 (1987).....25

Cleburne v. Cleburne Living Ctr.,
473 U.S. 432, 450 (1985).....6, 26, 27

Dandridge v. Williams,
397 U.S. 471, 485 (1970).....19

DeBoer v. Snyder,
772 F.3d 388 (6th Cir. 2014).....*passim*

Federal Communications Commission v. Beach Communications, Inc.,
508 U.S. 307, 313-14 (1993).....18, 19

Grutter v. Bollinger,
539 U.S. 306, 327-33 (2003).....25

Heller v. Doe,
509 U.S. 312, 330 (1993).....17, 19

Hernandez v. Robles,
7 N.Y.3d 338, 821 N.Y.S.2d 770 (N.Y. App. 2006).....25

Jackson v. Abercrombie,
884 F. Supp. 2d 1065, 1107 (D. Haw. 2012).....27

Page(s)

Johnson v. Robinson,
415 U.S. 361, 383 (1974).....26, 27
Loving v. Virginia,
388 U.S. 1, 12 (1967).....9, 17
Maynard v. Hill,
125 U.S. 190, 211 (1888).....17
Moore v. East Cleveland,
431 U.S. 494, 503 (1977).....9
Morrison v. Sadler,
821 N.E.2d 15, 23, 29 (Ind. App. 2005).....27
Nordlinger v. Hahn,
505 U.S. 1, 10, 11, 17-18 (1992).....17
Parham v. J.R.,
442 U.S. 584, 602 (1979).....21
Romer v. Evans,
517 U.S. 620, 634-35 (1996).....6
Santosky v. Kramer,
455 U.S. 745, 760 n.11 (1982).....23
Standhardt v. Super. Ct.,
77 P.3d 451, 463 (Ariz. Ct. App. 2003).....27
Smith v. Org. of Foster Families
For Equal. & Reform,
431 U.S. 816, 845 (1977).....21
Troxel v. Granville,
530 U.S. 57, 68 (2000).....21
United States v. Virginia,
518 U.S. 515, 533 (1996).....25

Page(s)

United States v. Windsor,
133 S.Ct 2675, 2691 (2013).....*passim*
Vacco v. Quill,
521 U.S. 793, 799 (1997).....27
Washington v. Glucksberg,
521 U.S. 702, 721 (1997).....9
Williams v. North Carolina,
317 U.S. 287, 303 (1942).....17
Zablocki v. Redhail,
434 U.S. 374, 384 (1978).....9, 17

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment to the
Constitution of the United States.....*passim*
Fifteenth Amendment to the
Constitution of the United States.....8
Nineteenth Amendment to the
Constitution of the United States.....8
Ky. Const. § 233a.....3, n. 2, 4
KRS 402.010.....3, n.2
KRS 402.020.....3, n.2
KRS 402.040.....3, n.2

OTHER AUTHORITIES

Page(s)

1 William Blackstone, Commentaries *435.....21
Doherty, William J., et al.,
Responsible Fathering,
60 J. Marriage & Fam. 277,
280 (1998).....20
Ellis, Bruce J., et al.,
Does Father Absence Place
Daughters at Special Risk
for Early Sexual Activity
and Teenage Pregnancy?,
74 Child Dev. 801, 801 (2003).....24
Finer, Lawrence B., and Zolna, Mia R.,
Unintended Pregnancy in the
United States: Incidence and
Disparities, 2006, 84 Contraception
478, 481 Table 1 (2011).....19
Flouri, Elrinia and Buchanan, Ann,
The role of father involvement
in children's later mental health,
26 J. Adolescence 63, 63 (2003).....23
George, Robert P., et al.,
What is Marriage? 38 (2012).....16

Page(s)

Glenn, Norval D.
The Struggle For Same-Sex Marriage, 41 Soc'y 25, 26 (2004).....16
Levi-Strauss, Claude
The View From Afar 40-41 (1985).....16
Manning, Wendy D. and Lamb, Kathleen A.,
Adolescent Well Being in Cohabiting, Married, and Single-Parent Families, 65 J. Marriage & Fam. 876, 890 (2003).....22, n.3
Marquardt, Elizabeth, et al.,
My Daddy's Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation, Institute for American Values, at 7, *available at* http://familyscholars.org/my-daddys-name-is-donor-2/.....23
McLanahan, Sara and Sandefur, Gary,
Growing Up with a Single Parent: What Hurts, What Helps 1 (1994).....22, n. 3

Page(s)

Moore, Kristin Anderson, et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We do About It?*, Child Trends Research Brief 6 (June 2002).....20

Obama, Barack, *President Obama's Speech on Fatherhood* (Jun. 15, 2008), *transcript available at* http://www.realclearpolitics.com /articles/2008/06/obamas_speech_ on_fatherhood.html.....24

Popenoe, David, *Life Without Father* 146 (1996).....24-25

Quale, G. Robina, *A History of Marriage Systems* 2 (1988).....16

United Nations Convention on the Rights of the Child, art. 7, § 1.....21

Wilcox, W. Bradford, eds., *Why Marriage Matters* 15 (2d ed. 2005).....16

Wilcox, W. Bradford, *Reconcilable Differences: What Social Sciences Show About Complementarity of Sexes & Parenting*, Touchstone, Nov. 2005.....25

Page(s)

Wildsmith, Elizabeth, et al.,
Childbearing Outside of Marriage: Estimates and Trends in the United States, Child Trends Research Brief 5 (Nov. 2011).....19
Wilcox, W. Bradford, et al., eds.,
Why Marriage Matters 11 (3d ed. 2011).....22, n.3
Wilson, James Q.,
The Marriage Problem 41 (2002).....16, 23

INTEREST OF AMICUS CURIAE

The Family Trust Foundation of Kentucky, Inc., a/k/a The Family Foundation ("The Family Foundation"), tenders its amicus curiae brief urging this Court to affirm the Sixth Circuit Court of Appeals.[1] Formed over twenty-five years ago, The Family Foundation's articles of incorporation provide:

> Recognizing that the family is the basic building block of society and the primary agency in the transmission of the values, the perception and the discernment of life, we conclude that it is a sacred trust, both in concept and practice, in form and expression, to be passed from one generation to another, intact, without loss, and purposefully enriched.

For centuries the family has been acknowledged as the building block of any culture and the cornerstone of every society. A mother and a father form an

---

[1] Counsel for the parties consented in writing to the filing of this brief by counsel for The Family Foundation. No counsel for any party authored this brief in whole or in part and no counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than the amicus curiae and its counsel, made any such monetary contribution.

environment that shapes, directs, creates and recreates the future of children in their care. The Family Foundation is a non-profit organization which advocates public policies to protect, preserve and strengthen traditional families. It encourages every elected and appointed official and judge to first ask what a vote, action or ruling will do for, or do to, the family. The Family Foundation offers its arguments for upholding traditional marriage laws as a friend of the Court in this proceeding.

ISSUES BEFORE THE COURT

The Court did not ask the parties address whether States' traditional marriage laws between one man and one woman are unconstitutional but instead to address whether the Fourteenth Amendment imposes an affirmative obligation on States to recognize marriage between two people of the same sex: (1) Does the Fourteenth Amendment require a State to license a marriage between two people of the same sex? and (2) Does the Fourteenth Amendment require a State to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state? Under well known precedent, the answer to both questions is "no".

SUMMARY OF ARGUMENT

Marriage is an institution which has as its genesis the biological ability of a man and a woman to procreate. Because of that, traditional marriage laws serve a legitimate and compelling State interest of regulating the intended and unintended natural effects of male/female intercourse: children. Accepting as fact the unique procreative abilities of men and women, it is no leap of logic to see why a citizenry would think it reasonable for a State to regulate male-female relationships. For this and other reasons, States, like Kentucky, codified in statute the commonly held belief that marriage was between one man and one woman.[2] Indeed, the institution of marriage long preceded the Constitution of the United States and the Constitution of Kentucky. The basis for not licensing/recognizing same-sex marriages is not a dislike, prejudice or animus toward gay people. That is not what this case is about. This case is about marriage, parenting and children. Same-sex marriage withholds either a father or a mother while telling the child that it does not matter -- that it is all the same; but it is not the same. Gay marriage not only redefines marriage, it also redefines

---

[2]Kentucky law does not license or recognize heterosexual marriages which are polygamous or polyamorous. Ky. Const. §233a, KRS 402.010, KRS 402.020, KRS 402.040.

parenting. Same-sex marriage purports to normalize a family structure that necessarily deprives children of something precious and foundational -- either a father or a mother. Gay marriage denies children something they long for while at the same time telling children they do not need what they naturally crave. Claimants say it will be okay -- but it is not.

Thus, in 2004, in response to courts in other states judicially redefining marriage, the Kentucky legislature preemptively approved a resolution to place before voters a proposed amendment to the Kentucky Constitution which codified the long existing statutory definition of marriage as a union between a man and a woman. In response, seventy-four percent of Kentucky voters voted in favor of the amendment. Ky. Const. § 233a. Joined by the *ad hominem* chorus of the mainstream media and describing themselves as victims of discrimination and animus, opponents of traditional marriage opted not for the political/democratic process -- which otherwise appears to be working for them in other states -- but for the more expeditious process of petitioning the federal courts to declare State traditional marriage laws unconstitutional. The claimants assert that traditional marriage laws are unconstitutional because they deprive same-sex couples who are in loving and committed relationships of the benefits of "marriage". In short, the claimants' argument is that children do not and have never needed a father and a mother, that

genderless marriage is a constitutionally protected right and that State laws which do not recognize that right are unconstitutional. Such arguments are self-centered and selfish in their disregard for children. They are also contrary to well-settled precedent and the fact that the Fourteenth Amendment does not require States to recognize marriage generally and same-sex marriage specifically.

Under *United States v. Windsor*, 133 S.Ct 2675, 2691 (2013), the "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." Consistent with this in *Baker v. Nelson*, 409 U.S. 810, 810 (1972), the Court dismissed an appeal from the Minnesota Supreme Court finding that Minnesota's marriage law did not raise "a substantial federal question." Separating the definition of marriage from the regulation of domestic relations is a hair which cannot be split. In *Windsor* it was the definition of marriage in the Defense of Marriage Act of 1996 (DOMA) which was at issue. *Windsor*, 133 S.Ct. at p. 2683. In a larger sense, under a love and commitment standard advocated by the claimants, if the definition of marriage is federalized, States will also be required to recognize polygamous or polyamorous marriages among adults who claim to be in loving and committed relationships.

A love and commitment definition of marriage creates its own set of problems. It requires the measurement of the immeasurable and leads to its own constitutional questions. For example, no State requires couples to be in love or to be committed to one another. A love and commitment criteria adds an additional requirement not otherwise in State law. What about heterosexual couples who marry but are not *in love*? On the other hand, the love and commitment definition fails to account for polygamous and polyamorous marriages. Presumably, love and commitment abound in these relationships. For this, the claimants provide no answer. Yet, these are important questions which beg for answers from this Court if States are to be federally mandated to license/recognize all marital relationships based on love and commitment.

The claimants also argue that recent attitudinal changes concerning a larger acceptance of loving relationships among gay couples nullify any legitimate purpose being served by State traditional marriage laws. Given that traditional marriage laws were adopted decades ago, changing attitudes today do not nullify a legitimate purpose and a rational basis leaving only an "irrational prejudice" or a conclusion that the law was "born of animosity" when the marriage laws were adopted. *See Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985), and *Romer v. Evans*, 517 U.S. 620, 634-35 (1996).

Under the claimants' reasoning, laws may be

constitutional one day and unconstitutional the next only if a court believes voters' actions decades ago did not reflect an acceptable purpose and motivation. Simply put, under the claimants' view, any disagreement with them must be born of "irrational prejudice" and/or "animosity" because, in their view, there can be no purpose or rational basis for the law. Such is simply not true. If it was, one would not only have to ignore statistical evidence of purpose and relationship, but also conclude that the votes/opinions of the four dissenting Supreme Court Justices in *Windsor* as well as majority decision by Judge Jeffrey S. Sutton and Judge Deborah L. Cook, at the Sixth Circuit, were also born of irrational prejudice and animosity toward gay couples. Of course, the claimants' arguments in these regards are nonsensical; but the point remains, that if Supreme Court Justices and Sixth Circuit Judges can have a rational basis for disagreement so can legislators and the voting public. As is shown below, the fact is, and thoughtful judges have said it, that States' marriage laws recognizing marriage as a union between one man and one woman are rationally related to a legitimate State purpose and were not borne of irrational prejudice or animosity.

ARGUMENT

I. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE STATES TO LICENSE/ SAME-SEX MARRIAGES.

Ratified in 1868, the Fourteenth Amendment provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No language appears in the text of the Fourteenth Amendment which requires States to license/recognize marriage in general and same-sex marriage in particular. Notwithstanding arguments of the far reach of the Fourteenth Amendment, that reach is not without its limits. For example, the Fifteenth Amendment, ratified in 1870, prohibited the use of race, color or previous condition of servitude in determining which citizens may vote. The Nineteenth Amendment, ratified in 1920, prohibited the government from denying women the right to vote on the same terms as men. Surely, the Fifteenth and Nineteenth Amendments would have been unnecessary if the Fourteenth Amendment had prohibited States denying rights as fundamental as the right to vote based on sex, race, color or previous condition of servitude. When the Fourteenth

Amendment is silent on matters of important rights, however, the Court has been willing imply rights buy has limited its willingness to do so except for those fundamental rights which are "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977). While the right to marry is arguably a fundamental right, the right to marry someone of the same sex is not a right "deeply rooted in this Nation's history and tradition" which can be implied to exist under the Fourteenth Amendment. *See e.g. Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). To the contrary, it is undisputed that issues surrounding gay marriage have arisen in only in the recent past:

> From the vantage point of 2014, it would now seem, the question is not whether American law will allow gay couples to marry; it is when and how that will happen. That would not have seemed likely as recently as a dozen years ago. For better, for worse, or for more of the same, marriage has long been a social institution defined by relationships between men and women. So long defined, the tradition is measured in millennia, not centuries or decades. So widely shared, the tradition until recently

> had been adopted by all governments and major religions of the world.

DeBoer, et al., v. Snyder, et al., 772 F.3d 388, 395 (6th Cir. 2014). That marriage is between a man and a woman was a long held belief was acknowledged by this Court in *Windsor*, 133 S.Ct. at p. 2689:

> For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of the term and to its role and function throughout the history of civilization.

When the limits of the Fourteenth Amendment are reached, even for those implied rights, as they have been here, under *Windsor*, deference must be afforded to the States. To this end, the Sixth Circuit correctly recognized the importance of this, stating that: "Process and structure matter greatly in American government. Indeed, this may be the most reliable, liberty-assuring guarantees of our system of government, requiring us to take seriously the route the United States Constitution contemplates for making such a fundamental change to such a fundamental social institution." *DeBoer*, 772 F.3d at p. 396. In the view of the Sixth Circuit and The Family Foundation, absent exigent circumstances, including an affirmative constitutional requirement for States to license/recognize same-sex marriages, policy shifts which are not in the Constitution and

which depart from the traditional and expressed will of the majority must follow the political/democratic process. Otherwise, concerns are validated that the views of an appointed judiciary are being substituted for the will of citizens and of the States.

II. DEFERENCE TO THE STATES IS NOT DEFERENCE IF IT ONLY APPLIES WHEN IN AGREEMENT WITH STATE ACTION.

Deference to the States only when the Court is in agreement is no deference at all. If agreement is the new test for deference, *Windsor* would be meaningless yielding to an outcome based jurisprudence where the value of *stare decisis* falls victim to expediency. Recognizing the unique invasiveness of DOMA into the realm of domestic relations which was within the province of the States, *Windsor* enunciated three principals of state sovereignty directly supporting deference to define marriage as the States have. First is right of the States to define marriage for their community. *See, e.g.*, *Windsor*, 133 S. Ct. at 2689-90 ("the definition and regulation of marriage" is "within the authority and realm of the separate States"); *id.* at 2691 ("The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations"); *id.* at 2692 (discussing the State's

"essential authority to define the marital relation"). Indeed, *Windsor* stated, in no uncertain terms, that the Constitution permits States to define marriage through the political process, extolling the importance of "allow[ing] the formation of consensus" when States decide critical questions like the definition of marriage:

> In acting first to recognize and then to allow same-sex marriages, New York was responding to the initiative of those who sought a voice in shaping the destiny of their own times. **These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended.** The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

[Emphasis added]. *Id.* (quotation marks, alterations, and citation omitted); *see also id.* at 2693 ("same-sex marriages made lawful by the unquestioned authority of the States").

Second, *Windsor* recognized that federalism provides ample room for variation between States'

domestic-relations policies concerning which couples may marry. *See id.* at 2691 ("Marriage laws vary in some respects from State to State."); *id.* (acknowledging that state-by-state marital variation includes the "permissible degree of consanguinity" and the "minimum age" of couples seeking to marry).

Third, *Windsor* stressed federal deference to the public policy reflected in state marriage laws. *See id.* at 2691 ("[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations," including decisions concerning citizens' "marital status"); *id.* at 2693 (mentioning "the usual [federal] tradition of recognizing and accepting state definitions of marriage").

That States have the right to define marriage for themselves, that States may differ in their marriage laws concerning which couples are permitted to marry and that federalism demands deference to state marriage policies lead to one inescapable conclusion: that Kentuckians (no less than citizens in States that have chosen to redefine marriage) have the right to define marriage. Any other outcome would contravene *Windsor* by federalizing the definition of marriage and overriding the policy decisions of States, like Kentucky, that have chosen to maintain the one man - one woman marriage institution.

Concerning the last sentence of the majority opinion in *Windsor*: "This opinion and the holding

are confined to those lawful marriages." *Windsor*, 133 S.Ct. at 2696. It is unclear what this language is doing. If it is referring to marriages only in New York, then it would be saying that deference will be afforded to the States only if the Court agrees with the State action. Surely, that would not be the case for reasons expressed above. Alternatively, more logically, it may be referring to the characterization of the DOMA as causing "'discriminations of an unusual character'" because DOMA federalized determinations regarding marriage which had been left to States, like New York, for decades. *Windsor*, 133 S.Ct. at 2693. Under the doctrine of *stare decisis*, those eleven words should not nullify the rest of the *Windsor* opinion concerning deference to be afforded States concerning matters of domestic relations, including how marriage is defined. If deference is due New York, when allowing same-sex marriage, deference is also due to the States which define marriage differently. Any other approach affords credibility to concerns about jeopardizing "the most reliable, liberty-assuring guarantees of our system of government . . ." in the interest of expediency as expressed by the Sixth Circuit. *DeBoer*, 277 F.3d at p. 396.

III. STATES HAVE AN INTEREST IN MARRIAGE LAWS WHICH ARE RATIONALLY RELATED TO A LEGITIMATE PURPOSE.

Deference to the States is justified because of the State's interest in marriage laws. States preside over marriage, separation, divorce, children, custody, visitation, education and truancy just to name a few of the issues arising under State domestic relations laws. The so-called unique irrational prejudice and animus are absent when State's have a legitimate interest in the purpose to be served by the marriage laws. Simply put, marriage as a public institution exists to regulate the intended and unintended consequences of sex by channeling men and women into stable unions for the benefit of the children that result.

The claimants argue that the reason they want to marry -- love and commitment -- is the reason that State marriage laws are unconstitutional; however, the *government's* purpose for recognizing and regulating marriage is distinct from the many *private* reasons people marry -- reasons that often include love, emotional support, commitment or companionship. Indeed, from the State's perspective, marriage is a vital social institution that serves indispensable public purposes. Traditional marriage which serves the needs of children has spanned diverse cultures,

nations, and religions. Anthropologists have recognized that "the family — based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children — appears to be a practically universal phenomenon, present in every type of society." Claude Levi-Strauss, *The View From Afar* 40-41 (1985); *see also* G. Robina Quale, *A History of Marriage Systems* 2 (1988) ("Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies."). Scholars from a wide range of disciplines have acknowledged that marriage is "social recognition . . . imposed for the purpose of regulation of sexual activity and provision for offspring that may result from it." Norval D. Glenn, *The Struggle For Same-Sex Marriage*, 41 Soc'y 25, 26 (2004); *see also* W. Bradford Wilcox et al., eds., *Why Marriage Matters* 15 (2d ed. 2005).

Marriage encourages mothers and fathers to remain together and care for the children born of their union. Marriage is thus "a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." James Q. Wilson, *The Marriage Problem* 41 (2002). Certainly no other purpose can plausibly explain why marriage is so universal or even why it exists at all. *See* Robert P. George et al., *What is Marriage?* 38 (2012).

As the Supreme Court itself has stated, marriage is "an institution more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S. 287, 303 (1942), and is "fundamental to the very existence and survival of the [human] race." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quotations omitted); *see also Loving v. Virginia*, 388 U.S. 1, 12 (1967). "It is an institution, in the maintenance of which . . . the public is deeply interested, for it is the foundation of the family and of society[.]" *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

A. A "plausible" reason is all that is required.

So long as courts can conceive of some "plausible" reason for the law, even one that did not motivate legislators who enacted it, the law must stand, no matter how unfair, unjust or unwise the judges may consider it as citizens. *Heller v. Doe*, 509 U.S. 312, 330 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 11, 17-18 (1992). "Accordingly, this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10

(1992)(citations omitted). To date, the Court has not recognized same-sex marriage as a fundamental right or of an inherently suspect characterization.

With the case of marriage, legislation concerning marriage was not enacted to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse. Imagine a society without marriage. It does not take long to envision problems that might result from an absence of rules about how to handle the natural effects of male-female intercourse: children. May men and women follow their procreative urges wherever they may take them? Who is responsible for the children that result? How many mates may an individual have? How does one decide which set of mates is responsible for which set of children? That these issues are orderly addressed by the States shows just how relatively stable society is, not that States have no explanation for creating such rules in the first place. *DeBoer,* 772 F.3d. at p. 404.

B. Rational-basis review requires deference to State marriage laws.

Rational basis review constitutes a "paradigm of judicial restraint" under which courts have no "license . . . to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). "A statutory classification fails rational-basis review only when it

rests on grounds wholly irrelevant to the achievement of the State's objective." *Heller v. Doe*, 509 U.S. 312, 324 (1993) (quotation marks omitted); Arguments that some man-woman couples cannot procreate due to medical condition or age change nothing because to satisfy the rational basis test, classification need not be "made with mathematical nicety". *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (noting that the challenged classification need not be "made with mathematical nicety") (quotation marks omitted). Thus, Kentucky's marriage laws "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for" them. *Beach Commc'ns, Inc.*, 508 U.S. at 313.

In fact, Kentucky has a compelling interest in addressing the particular concerns associated with the birth of unplanned children. Nearly half of all pregnancies in the United States, and nearly 70 percent of pregnancies that occur outside marriage, are unintended. Lawrence B. Finer and Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 Contraception 478, 481 Table 1 (2011). Yet unintended births out of wedlock "are associated with negative outcomes for children." Elizabeth Wildsmith et al., *Childbearing Outside of Marriage: Estimates and Trends in the United States*, Child Trends Research Brief 5 (Nov. 2011). Children born from unplanned pregnancies where their mother and father are not married to

each other are at a significant risk of being raised outside stable family units headed by their mother and father jointly. *See* William J. Doherty et al., *Responsible Fathering*, 60 J. Marriage & Fam. 277, 280 (1998) ("In nearly all cases, children born outside of marriage reside with their mothers" and experience "marginal" father presence). Unfortunately, on average, children do not fare as well when they are raised outside "stable marriages between [their] biological parents," as a leading social-science survey explains:

> Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents. . . . There is thus value for children in promoting strong, stable marriages between biological parents.

Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We do About It?*, Child Trends Research Brief 6 (June 2002). In short, unintended pregnancies—the frequent result of sexual relationships between men and women, but never the product of same-sex relationships—pose particular concerns for children and, by extension, for society.

Kentucky also has a compelling interest in encouraging biological parents to join in a committed union and raise their children together. Indeed, the Supreme Court has recognized a constitutional "liberty interest" in "the natural family," a paramount interest having "its source . . . in intrinsic human rights." *Smith v. Org. of Foster Families For Equal. & Reform*, 431 U.S. 816, 845 (1977). While that right vests in natural parents, *id.* at 846, "children [also] have a reciprocal interest in knowing their biological parents." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2582 (2013) (Sotomayor, J., dissenting); *see also* United Nations Convention on the Rights of the Child, art. 7, § 1 ("The child . . . shall have . . . , as far as possible, the right to know and be cared for by his or her parents."). "[T]he biological bond between a parent and a child is a strong foundation" for "a stable and caring relationship." *Adoptive Couple*, 133 S. Ct. at 2582 (Sotomayor, J., dissenting).

The law has thus historically presumed that these "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *accord Troxel v. Granville*, 530 U.S. 57, 68 (2000); *see also* 1 William Blackstone, Commentaries *435 (recognizing the "insuperable degree of affection" for one's natural children "implant[ed] in the breast of every parent"). Social science has proven this presumption well founded, as the most reliable studies have shown

that, on average, children develop best when reared by their married biological parents in a stable family unit. As one social-science survey has explained, "research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage." Moore, *supra*, at 6. "Thus, it is not simply the presence of two parents . . . , but the presence of *two biological parents* that seems to support children's development." *Id.* at 1-2.[3] Studies reflect that

---

[3] *See also* W. Bradford Wilcox et al., eds., *Why Marriage Matters* 11 (3d ed. 2011) ("The intact, biological, married family remains the gold standard for family life in the United States, insofar as children are most likely to thrive—economically, socially, and psychologically—in this family form."); Wendy D. Manning and Kathleen A. Lamb, *Adolescent Well Being in Cohabiting, Married, and Single-Parent Families*, 65 J. Marriage & Fam. 876, 890 (2003) ("Adolescents in married, two-biological-parent families generally fare better than children in any of the family types examined here, including single-mother, cohabiting stepfather, and married stepfather families. The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents. Our findings are consistent with previous work[.]"); Sara McLanahan and Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* 1 (1994) ("Children who grow up in a household with only one biological parent are worse off, on average, than children who

"[y]oung adults conceived through sperm donation" (who thus lack a connection to, and often knowledge about, their biological father) "experience profound struggles with their origins and identities." Elizabeth Marquardt et al., *My Daddy's Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation*, Institute for American Values, at 7, *available at* http://familyscholars.org/my-daddys-name-is-donor-2/. Some children who are deprived of "know[ing] [their] natural parents" experience "far reaching" "losses [that] cannot be measured". *Santosky v. Kramer*, 455 U.S. 745, 760 n.11 (1982)(termination of parental rights).

Kentucky also has a compelling interest in encouraging fathers to remain with their children's mothers and jointly raise the children they beget. "The weight of scientific evidence seems clearly to support the view that fathers matter." James Wilson, *supra*, at 169; *see, e.g.*, Elrini Flouri and Ann Buchanan, *The role of father involvement in children's later mental health*, 26 J. Adolescence 63, 63 (2003) ("Father involvement . . . protect[s] against adult psychological distress in women."); Bruce J.

---

grow up in a household with both of their biological parents, regardless of the parents' race or educational background, regardless of whether the parents are married when the child is born, and regardless of whether the resident parent remarries.").

Ellis et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 Child Dev. 801, 801 (2003) ("Greater exposure to father absence [is] strongly associated with elevated risk for early sexual activity and adolescent pregnancy."). Indeed, President Obama has observed the adverse consequences of fatherlessness:

> We know the statistics—that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools and twenty times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home, or become teenage parents themselves. And the foundations of our community are weaker because of it.

Barack Obama, *Obama's Speech on Fatherhood* (Jun. 15, 2008), *transcript available at* http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html.

The importance of fathers reflects the importance of gender-differentiated parenting. "The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development." David Popenoe, *Life Without*

Father 146 (1996). Indeed, both commonsense and "[t]he best psychological, sociological, and biological research" confirm that "men and women bring different gifts to the parenting enterprise, [and] that children benefit from having parents with distinct parenting styles[.]" W. Bradford Wilcox, *Reconcilable Differences: What Social Sciences Show About Complementarity of Sexes & Parenting*, Touchstone, Nov. 2005.

Recognizing the child-rearing benefits that flow from the diversity of both sexes is consistent with our legal traditions. *See Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting) (acknowledging that "children have a fundamental interest in sustaining a relationship with their mother . . . [and] father" because, among other reasons, "the optimal situation for the child is to have both an involved mother and an involved father" (quotation marks and alterations omitted)). Our constitutional jurisprudence acknowledges that "[t]he two sexes are not fungible." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quotation marks omitted). And the Supreme Court has recognized that diversity in education is beneficial for adolescents' development. *See Grutter v. Bollinger*, 539 U.S. 306, 327-33 (2003). It thus logically follows that a child would benefit from the diversity of having both her father and mother involved in her everyday upbringing. *See Hernandez v. Robles*, 7 N.Y.3d 338, 821 N.Y.S.2d 770 (N.Y. App. 2006)

("[T]he Legislature could rationally proceed on the commonsense premise that children will do best with a mother and father in the home. . . . [A] legislature . . . could rationally decide to offer a special inducement, the legal recognition of marriage, to encourage the formation of opposite-sex households. In sum, there are rational grounds on which the Legislature could choose to restrict marriage to couples of opposite sex." Citations omitted.)

C. Kentucky's marriage laws are rationally related to furthering compelling interests.

Under rational basis review, the requisite relationship between the State interests and the means chosen to achieve those interests is satisfied when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not[.]" *Johnson v. Robinson*, 415 U.S. 361, 383 (1974). Similarly, a State satisfies rational basis review if it enacts a law that makes special provision for a group because its activities "threaten legitimate interests . . . in a way that other [groups' activities] would not." *Cleburne*, 473 U.S. at 448. The Fourteenth Amendment does not require Kentucky to recognize or include groups that do not advance a legitimate purpose alongside those that do. This commonsense rule represents an application of the general principle that "[t]he Constitution does not require things which are different in fact or

opinion to be treated in law as though they were the same." *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (quotation marks and citation omitted). "[W]here a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001) (quotation marks omitted). Therefore, the relevant inquiry is not whether excluding same-sex couples from marriage furthers the State's interest in steering man-woman couples into marriage, but rather "whether an opposite-sex definition of marriage furthers legitimate interests that would not be furthered, or furthered to the same degree, by allowing same-sex couples to marry." *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1107 (D. Haw. 2012); *accord Andersen v. King Cnty.*, 138 P.3d 963, 984 (Wash. 2006) (plurality opinion); *Morrison v. Sadler*, 821 N.E.2d 15, 23, 29 (Ind. App. 2005); *Standhardt v. Super. Ct.*, 77 P.3d 451, 463 (Ariz. Ct. App. 2003).

To stating the obvious, sexual relationships between individuals of the same-sex do not create children, intentionally or unintentionally. Children are brought into those relationships only by intentional choice and pre-planned action. Under *Johnson* and *Cleburne*, *supra*, rationale basis review

is satisfied thus ending the analysis. Kentucky's marriage laws should be upheld as constitutional.

CONCLUSION

For the foregoing reasons, this Court should affirm the Opinion and Judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,

/s/ Stanton L. Cave

Stanton L. Cave, Esq.
LAW OFFICE OF STAN CAVE
P.O. Box 910457
Lexington, KY 40591-0457
Telephone: (859) 309-3000
Facsimile: (859) 309-3001
Email:
stan.cave@stancavelaw.com
Counsel for Amicus Curiae, The Family Trust Foundation of Kentucky, Inc., d/b/a The Family Foundation